Supreme Court, U.S.
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OFFICE OF THE CLERK

No.

In the Supreme Court of the United States

Dianna Roberts,
Petitioner,

v.

WMC Mortgage Corporation, Bank One, N.A., Fairbanks Capital Corporation,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

APPENDIX TO THE PETITION FOR A WRIT OF CERTIORARI

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NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

DIANNA ROBERTS,

Plaintiff-Appellant,

v.

WMC MORTGAGE CORP.; et al.,

Defendants-Appellees.

No. 04-35523

D.C. No. CV-02-00499-BR

MEMORANDUM*

Appeal from the United States District Court
for the District of Oregon
Anna J. Brown, District Judge, Presiding

Submitted November 18, 2005**
Portland, Oregon

Before: GRABER and RAWLINSON, Circuit Judges, and OTERO***, District Judge.

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* This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by 9th Cir. R. 36-3.

** This panel unanimously finds this case suitable for decision without oral argument. See Fed. R. App. P. 34(a)(2).

*** The Honorable S. James Otero, U.S. District Judge for the Central District of California, sitting by designation.

Dianna Roberts (Roberts) appeals the district court's grant of summary judgment in favor of WMC Mortgage Corp. (WMC), Bank One, N.A. (Bank One), and Fairbanks Capital Corp. (Fairbanks) on her claim for rescission of a deed of trust and promissory note (collectively Deed of Trust) under the Truth In Lending Act (TILA), 15 U.S.C. § 1601-1677. In addition, Roberts appeals the district court's denial of her motion to reopen discovery pursuant to Federal Rule of Civil Procedure 56(f) and the district court's award of costs to WMC Mortgage, Bank One, and Fairbanks Capital.

I. The District Court's Subject Matter Jurisdiction

Bank One raises the issue of the district court's subject matter jurisdiction over Roberts' TILA rescission claim for the first time on appeal. However, challenges to a federal court's subject matter jurisdiction cannot be waived and may be raised at any time. *See United States v. Cotton*, 353 U.S. 625, 630 (2002). The district court lacked subject matter jurisdiction over Roberts' rescission claim because she failed to deliver a notice of rescission to Bank One, the current beneficiary of her Deed Of Trust, within TILA's three-year limitations period. *See Miguel v. Country Funding Corp.*, 309 F.3d 1161, 1165 (9th Cir. 2002). We therefore vacate the district court's grant of summary judgment as to Robert's TILA rescission claim, and remand with instructions to the district court to dismiss this claim for lack of subject matter jurisdiction.

II. The District Court's Denial of Additional Discovery

The district court is entitled to wide latitude in making discovery rulings, and its ruling should not be overturned "in the absence of a clear abuse of discretion." *California ex. rel. California Dep't Of Toxic Substances Control v. Campbell*, 138 F.3d 772, 779 (9th Cir. 1998)(citation omitted). In the context of

a Rule 56(f) motion, "[w]e will only find that the district court abused its discretion if the movant diligently pursued its *previous* discovery opportunities, and if the movant can show how allowing *additional* discovery would have precluded summary judgment." *Qualls v. Blue Cross of Cal., Inc.*, 22 F.2d 839, 844 (9th Cir. 1994)(emphasis in original). Roberts failed to make the required showing, and we therefore conclude the district court did not abuse its discretion by denying her Rule 56(f) motion for additional discovery. *See Maljack Prods., Inc. v. GoodTimes Home Video Corp.*, 81 F.3d 881, 888 (9th Cir. 1996).

III. The District Court's Award Of Costs.

Roberts alleges that the district court's award of costs to Bank One and WMC was improper because WMC and Bank One filed a Bill of Costs but failed to file a motion. However, under Oregon's local rules, to recover costs other than attorneys fees, the prevailing party is required to file and serve only a Bill of Costs. *See* D. Or. R. 54.1.

Roberts also asserts that the district court's award of costs was improper because WMC and Bank One were not prevailing parties. A party who is dismissed for lack of subject matter jurisdiction is not a prevailing party. *See Miles v. California*, 320 F.3d 986, 988 (9th Cir. 2003). However, where multiple claims are asserted and a litigant is successful on some claims, an award of costs need not be apportioned if the claims are so inextricably intertwined that apportionment would be meaningless. *See, e.g. Gracie v. Gracie*, 217 F.3d 1060, 1069-70 (9th Cir. 2000). The district court granted summary judgment in favor of WMC and Bank One on the remainder of Roberts'

claims,[1] making them prevailing parties. *See Buckhannon Bd. & Care Home, Inc. V. W. Va. Dep't of Health & Human Res.*, 532 U.S. 598, 604 (2001). The record reflects that Roberts' claims were intertwined and that the district court's award of costs was unitary, making apportionment meaningless. *Gracie*, 217 F.3d at 1070.

We VACATE the district court's ruling on Roberts's TILA claim and REMAND with instructions to the district court to dismiss Roberts's rescission claim for lack of subject matter jurisdiction. We AFFIRM the district court's ruling in all other respects. Costs on appeal are awarded to Appellees.

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[1]The district court granted summary judgment in favor of Bank One and WMC on a Fair Debt Collection Practices Act claim. The district court also granted summary judgment in favor of WMC on Unlawful Trade Practices, misrepresentation, unilateral mistake, and fraudulent alteration claims.

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

DIANNA ROBERTS,

Plaintiff-Appellant,

v.

WMC MORTGAGE CORP.; et al.,

Defendants-Appellees.

No. 04-35523

D.C. No. CV-02-00499-BR

JUDGMENT

Appeal from the United States District Court for the District of Oregon (Portland).

This cause came on to be heard on the Transcript of the Record from the United States District Court for the District of Oregon (Portland) and was duly submitted.

On consideration whereof, it is now here ordered-and adjudged by this Court, that the judgment of the said District Court in this cause be, and hereby is **AFFIRMED**.

Filed and entered 03/10/06

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF OREGON

DIANNA ROBERTS,
Plaintiff,

CV 02-499-BR
OPINION AND ORDER

v.

WMC MORTGAGE CORP.; FINANCIAL LINK; DAVE LAVALLEY; NORTHWEST TRUSTEE SERVICES, LLC; BANK ONE, N.A.; CHICAGO TITLE INSURANCE COMPANY OF OREGON; MARGARET A. HARBAUGH; CAROLYN KNAUB; and REGIONAL TRUSTEE SERVICES CORPORATION,

Defendants.

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Plaintiff, *Pro Se*

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BROWN, Judge.

This matter comes before the Court on the Motion for Summary Judgment (#217) filed by Defendants WMC Mortgage Corporation; Bank One, N.A.; and Fairbanks Capital Corporation, and Plaintiff's [Cross] Motion for Summary Judgment (#229). For the following reasons, the Court **DENIES** Plaintiff's Motion and **GRANTS in part** and **DENIES in part** Defendants' Motion.

BACKGROUND

In her First Amended Complaint, Plaintiff asserts six claims. Plaintiff's First Claim is against Defendants WMC, Bank One, and Fairbanks for violation of the Truth in Lending Act (TILA), 15 U.S.C. § 1601, *et seq*. Plaintiff's Second Claim is against the same three Defendants for violation of the Fair Debt Collection Practices Act (FDCPA), 15 U.S.C. § 1692, *et seq*. Plaintiff's Third, Fourth, and Sixth Claims are common law claims of misrepresentation, unilateral mistake, and fraudulent alteration against WMC only. Plaintiff's Fifth Claim is against WMC only for violation of Oregon's Unfair Trade Practices Act (UTPA), Or. Rev. Stat. § 646.605, *et seq*.

Plaintiff has voluntarily dismissed her claims against all other Defendants.

Defendant Bank One also asserts a counterclaim for judicial foreclosure.

FACTS

The record in this case is extremely difficult to follow.

Plaintiff provides multiple copies of the same pages of her deposition transcript and attaches them to her Affidavit in no discernible order. Although both Plaintiff and Defendants mark documents as exhibits to their respective Affidavits, neither cites to any document by its exhibit number. Defendants, moreover, force the Court to follow a rabbit trail to find the documents they rely on to support their factual assertions. For example, in their supporting memoranda, Defendants cite to their Concise Statement of Facts rather than to the source document that supports the factual assertion. In

their Concise Statement, in turn, Defendants cite to various affidavits, primarily the Affidavit of John E. Kennedy, one of Defendants' attorneys. Although Kennedy attaches deposition transcripts as exhibits to his Affidavit, he also unnecessarily summarizes these transcripts.[1] Each of Kennedy's summaries contains a reference to a deposition transcript page number, but does not identify the exhibit letter or the exhibit page number.

To find the source of any particular factual assertion, therefore, the Court first must find the cited paragraph in Defendants' Concise Statement of Facts, locate the paragraph in the Kennedy Affidavit that is cited in the Concise Statement, and then search through the many pages attached to the Kennedy Affidavit to find the referenced page. Compounding the problem, Plaintiff followed Defendants' inefficient and confusing method when she prepared her response and [Cross] Motion for Summary Judgment.

This method of preparing a factual record is, to say the least, cumbersome. Nonetheless, after a painstaking review of the record, the Court finds many of the facts asserted by Defendants are disputed by Plaintiff and controverted by Plaintiff's testimony. Most of these disputed facts, however, are not material to the issues before the Court. In any event, the following facts appear to be uncontroverted.

Plaintiff is the owner of a home located at 17932 N.E. Wasco, Portland, Oregon, which is her primary residence. Plaintiff purchased the property in 1974, and by 1996 she had paid off all mortgages and owned the property outright. Between July 11, 1997, and August 7, 1997, however, Plaintiff borrowed $77,000 from Joy Masako and Mitsuyo Taira on promissory notes at 15 percent interest secured by Plaintiff's

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[1]Kennedy's summaries of the deposition testimony are not admissible evidence, and, therefore, the Court does not rely on them. The Court considers only the transcripts and other exhibits attached to Kennedy's Affidavit.

home.

In January 1998, Plaintiff began the process of refinancing her home in order to pay off the promissory notes. Plaintiff hired David LaValley, a mortgage broker with Financial Link, to help her find a loan.[2] On April 1, 1998, LaValley prepared and
Plaintiff signed a Uniform Residential Loan Application. Shortly thereafter, LaValley procured an adjustable rate mortgage loan (ARM) for Plaintiff through Northern Pacific Funding Group. On April 17, 1998, Plaintiff signed the loan documents at the office of Chicago Title Insurance Company of Oregon. Three days later, on April 20, 1998, Plaintiff rescinded the loan by Western Union telegram because she did not want an ARM.

LaValley apparently continued to search for a loan for Plaintiff. On August 19, 1998, LaValley faxed to Plaintiff a Federal Truth-in-Lending Disclosure Statement (HUD-1) and a Good Faith Estimate. Plaintiff signed both documents and faxed them back to LaValley the same day.[3] The HUD-1 includes a statement that the loan contains a "variable rate feature." The lender is not identified on this document. Kennedy Aff. Ex. C at 18.

Ultimately, Plaintiff entered into a loan with WMC. The closing on this loan took place on August 26, 1998, at Chicago Title. Carolyn Knaub, an escrow officer with Chicago Title, handled the closing. The loan was secured by a Deed of Trust

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[2]Plaintiff originally named LaValley and Financial Link as Defendants, but she later voluntarily dismissed her claims against them.

[3]Plaintiff denies signing many of the documents that appear to bear her signature. It is unclear, however, whether she denies signing the August 19, 1998, HUD-1. In any event, Plaintiff admits she received the HUD-1 prior to closing. *See* 1st Am. Compl. ¶ 38, and Ex. G.

on Plaintiff's residence. Part of the WMC loan proceeds were used to pay in full the Masako and Taira promissory notes, and Plaintiff received approximately $20,000 of the loan proceeds. The record is unclear as to which documents Plaintiff signed and/or received at closing. Plaintiff repeatedly refuses to acknowledge receipt of documents or to confirm her signature on them on the basis that the exhibits presented at her deposition were photocopies. In addition, at Plaintiff's deposition, defense counsel failed to follow up adequately on Plaintiff's denials. In any event, Plaintiff admits she did not read the documents she received either during closing or at any point thereafter.

On September 4, 1998, a Deed of Trust showing Dianna Roberts as the grantor, Regional Trustee Services Corporation as the trustee, and WMC as the beneficiary was recorded in Multnomah County. On September 1, 1998, WMC Secured Assets Corporation (WMC Secured Assets), WMC, and FNBC entered into a Pooling and Servicing Agreement. By virtue of this Agreement, WMC Secured Assets transferred all right, title, and interest in Plaintiff's mortgage and trust deed to FNBC. WMC is identified in the Agreement as the "Master Servicer." The Deed of Trust, however, shows WMC as the beneficiary, and an Adjustable Rate Note shows WMC as the lender. WMC Secured Assets does not appear on either the Note or the Deed of Trust. It is unclear, therefore, how WMC Secured Assets acquired any right, title, or interest in Plaintiff's loan. The significance of the Pooling and Servicing Agreement is also unclear because only parts of the Agreement are in the record, and none of the parties explains the function of the document or its relevance to Plaintiff's claims.

On September 25, 2000, an assignment of Plaintiff's Deed of Trust was recorded in Multnomah County, which showed WMC had assigned the Deed of Trust to First National Bank of Chicago (FNBC). Although the Assignment is dated June 16, 2000, Plaintiff contends the assignment from WMC to

FNBC occurred sometime before September 4, 1998. Bank One is a successor to FNBC by virtue of a merger, and FNBC changed its name to Bank One effective September 13, 1999. Defendants, however, do not explain why the Assignment dated June 16, 2000, reflects the name FNBC instead of Bank One.

On or about August 6, 2001, nearly three years after entering into the loan with WMC, Plaintiff sent a "notice of rescission" to WMC's legal counsel, Michael Mayer, in Woodland Hills, California. Plaintiff also sent a copy of the notice to WMC's corporate legal department in Salt Lake City, Utah. Plaintiff did not send the notice to Bank One.

Plaintiff has not made any payments on the loan since May 1, 2001.

STANDARDS

Fed. R. Civ. P. 56(c) authorizes summary judgment if no genuine issue exists regarding any material fact and the moving party is entitled to judgment as a matter of law. The moving party must show the absence of an issue of material fact. *Leisek v. Brightwood Corp.*, 278 F.3d 895, 898 (9th Cir. 2002). In response to a properly supported motion for summary judgment, the nonmoving party must go beyond the pleadings and show there is a genuine issue of material fact for trial. *Id.*

An issue of fact is genuine "'if the evidence is such that a reasonable jury could return a verdict for the nonmoving party.'" *Villiarmo v. Aloha Island Air, Inc.*, 281 F.3d 1054, 1061 (9th Cir. 2002) (quoting *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986)). The Court must draw all reasonable inferences in favor of the nonmoving party. *Id.* A mere disagreement about a material issue of fact, however, does not preclude summary judgment. *Jackson v. Bank of Haw.*, 902 F.2d 1385, 1389 (9th Cir. 1990). When the nonmoving party's claims are factually implausible, that party must come forward with more persuasive evidence than otherwise would be required. *Blue Ridge Ins. Co. v. Stanewich*, 142 F.3d 1145, 1147 (9th Cir. 1998) (citation omitted).

The substantive law governing a claim or a defense determines whether a fact is material. *Addisu v. Fred Meyer, Inc.*, 198 F.3d 1130, 1134 (9th Cir. 2000). If the resolution of a factual dispute would not affect the outcome of the claim, the court may grant summary judgment. *Arpin v. Santa Clara Valley Transp. Agency*, 261 F.3d 912, 919 (9th Cir. 2001).

DISCUSSION

I. Plaintiff's TILA damages claim (First Claim)

An action for damages for violation of TILA must be brought within one year from the date of the occurrence of the violation. 15 U.S.C. § 1640(e). Plaintiff alleges Defendants violated TILA in numerous respects arising from the closing of Plaintiff's loan with WMC. Defendants seek summary judgment on Plaintiff's TILA damages claim on the ground that Plaintiff filed this action on April 17, 2002, more than three years after the loan was closed on August 26, 1998. The Court finds there is no issue of material fact concerning this aspect of Defendants' Motion and, therefore, the Court holds Plaintiff's claims for damages under TILA are time barred.

II. Plaintiff's TILA recission claim (First Claim)

Plaintiff also seeks to rescind her loan transaction with WMC pursuant to TILA. In a consumer credit transaction in which the creditor acquires a security interest in the borrower's principal residence, TILA allows the borrower to rescind the transaction until midnight of the third business day following the consummation of the transaction or the delivery of the rescission forms and other information required under the statute. 15 U.S.C. § 1635(a). If the creditor fails to provide the required disclosures, the borrower's right to rescind the transaction extends for three years after the consummation of the transaction or until the property is sold, whichever occurs first. 15 U.S.C. § 1635(f). Plaintiff contends Defendants failed to provide her with the required notice of right to rescind and, therefore, her right to rescind the loan transaction extended until August 26, 2001.

Defendants, on the other hand, assert they are entitled to summary judgment as to Plaintiff's rescission claim for three reasons. First, Defendants assert Plaintiff received two copies of her right to rescind at closing. Second, Defendant Bank One contends it is entitled to summary judgment because Plaintiff failed to provide it with notice of her intent to rescind the transaction within the three-year time period. Third, Defendant Fairbanks Capital argues it cannot be held liable for any claims under TILA because it is neither a creditor nor an assignee.

A. Notice of right to rescind

Federal regulations required WMC to deliver to Plaintiff two copies of the notice of right to rescind. *See* 12 C.F.R. § 226.23(b)(1). Plaintiff contends she did not receive two copies of the required notice, and, therefore, her right to rescind extended three years beyond the date of closing until August 26, 2001.

Although the record on this point is confusing, Plaintiff admits she signed one copy of the required notice at the time of closing, and that copy was retained by Chicago Title. Directly above Plaintiff's signature on the notice is the following language: "I/We acknowledge receipt of two copies of NOTICE OF RIGHT TO CANCEL." Plaintiff also admits an unsigned copy of the notice was included in the papers she was given at closing and took home. Plaintiff, nonetheless, repeatedly denies she received two copies of the notice of right to rescind. Plaintiff does not contend she was misled by the Notice Of Right to Cancel nor that she did not understand her rescission right. Indeed, three months earlier, Plaintiff successfully rescinded a loan transaction within TILA's three-day period because she was dissatisfied with the interest rate. Plaintiff argues only that Defendants failed to satisfy the requirements of TILA because Plaintiff contends the regulations required WMC to obtain Plaintiff's signature on two copies of the notice and to allow Plaintiff to retain both signed copies.

Under the regulation, the creditor is required to "deliver

two copies of the notice of the right to rescind" to the borrower. 12 C.F.R. § 226.23(b)(1). The model notice included in Appendix H includes the statement: "Keep one copy of this notice because it contains important information about your rights." *Id.*, App. H-8. This language supports Defendants' position that the regulation is satisfied when the borrower is given two copies at closing but retains only one.

The uncontroverted evidence shows Defendant delivered two copies of the notice to Plaintiff at closing. Plaintiff retained one copy, and Chicago Title retained the other. The regulation requires nothing more. Accordingly, based on the undisputed facts, the Court concludes WMC provided Plaintiff with adequate notice of her right to rescind at closing on August 26, 1998. As a result, Plaintiff's right to rescind the transaction expired three business days later. The Court, therefore, holds Defendants are entitled to summary judgment on Plaintiff's TILA rescission claim.

III. Plaintiff's FDCPA Claim (Second Claim)

Plaintiff alleges Defendants WMC, Bank One, and Fairbanks violated 15 U.S.C. § 1692g(a)(3), (4), and (5). Plaintiff alleges as follows:

> With prior knowledge of Plaintiff's "Notice of Rescission" . . . Trustee's Notice of Sale . . . was sent on or about December 21, 2001, . . . and the purported "Notice of Trustee's Sale" sent by Northwest Trustee Services, LLC, acting as agent and trustee for Fairbanks Capital Corporation, Attorney In Fact For Bank One (sic), did not contain any statement required by 15 U.S.C. § 1692(g)(a) in subparagraphs (3), (4) and (5) thereof, which requires that a debt collector, at the time of or within five days of the initial communication with the debtor, to send the debtor statements that the alleged debt will be assumed valid unless disputed within

> thirty days, that the collector will obtain verification of the alleged debt and mail the same to the debtor if disputed within thirty days, and that the debt collector will provide the debtor with the name and address of the original creditor if requested within thirty days.

Pl.'s 1st Am. Verified Compl. ¶ 78. Plaintiff apparently contends Northwest Trustee Services, LLC, violated the FDCPA when it sent the Trustee's Notice of Sale. Northwest Trustee Services, however, is no longer a Defendant in this action.

Plaintiff also makes numerous allegations regarding Bank One's status as successor trustee, WMC's assignment of the Deed of Trust, and the status of Fairbanks. It is unclear, however, how these allegations relate to Plaintiff's FDCPA claim.

In addition, Plaintiff alleges Defendants violated various subsections of "15 U.S.C. §§ 807(10), 807(12), 808(6)(A), and 812(a)." No such statutes, however, exist. Plaintiff does not make any argument concerning these alleged statutes in her response to Defendant's Motion for Summary Judgment or her own [Cross] Motion for Summary Judgment. The Court, therefore, concludes Plaintiff has abandoned these allegations.

Plaintiff also alleges Defendants violated 15 U.S.C. § 1692g(b), which provides:

> If the consumer notifies the debt collector in writing within the thirty-day period described in subsection (a) of this section that the debt, or any portion thereof, is disputed, or that the consumer requests the name and address of the original creditor, the debt collector shall cease collection of the debt, or any disputed portion thereof, until the debt collector obtains verification of the debt or a copy of a judgment,

> or the name and address of the original creditor, and copy of such verification or judgment, or name and address of the original creditor, is mailed to the consumer by the debt collector.

Plaintiff alleges she timely disputed her debt, but Defendants failed to obtain verification of the debt and continued their collection efforts in violation of § 1692g(b). In her Complaint, Plaintiff does not identify which of the three Defendants allegedly violated this statute nor does she identify any specific improper collection efforts other than those allegedly made by Northwest Trustee Services who, as noted, is no longer a party to this action.

Defendants contend they are entitled to summary judgment as to this claim because it arises from Plaintiff's rescission claim and Plaintiff's rescission claim fails. Defendants, however, do not cite any authority for this assertion nor do they provide any analysis.

The requirements of § 1692g(b) are triggered when a debtor disputes a debt. This Court has not found any authority to support the proposition that a debt collector is retroactively relieved from its statutory obligation because a court ultimately concludes the debtor's dispute was without merit. Absent such authority, the Court concludes Defendants are not entitled to summary judgment on the basis that the Court has rejected Plaintiff's TILA rescission claim.

Defendants Bank One and WMC also argue they are entitled to summary judgment because the FDCPA applies only to debt collectors who collect debts that are "owed or due or asserted to be owed or due another." *See* 15 U.S.C. § 1692a(6). The FDCPA, therefore, protects consumers only against those entities who collect debts for third parties. To the extent they attempted to collect Plaintiff's debt, Defendants WMC and Bank One argue they did so on their own behalf rather than on behalf of any other entity and, therefore, the FDCPA does not

apply. The record does not reflect any evidence to support Plaintiff's assertion that either Bank One or WMC attempted to collect a debt on behalf of someone else.

Accordingly, the Court concludes the FDCPA does not apply to Defendants WMC and Bank One in this case, and, therefore, they are entitled to summary judgment as to this claim. Fairbanks, however, has not established it complied with the FDCPA and, therefore, the Court concludes it is not entitled to summary judgment.

IV. Plaintiff's UTPA Claim Against WMC (Fifth Claim)

Plaintiff alleges WMC used unconscionable tactics in connection with the loan transaction in violation of the UTPA, specifically Or. Rev. Stat. § 646.607. The UTPA, however, does not apply to loan transactions. *Cullen v. Inv. Strategies, Inc.*, 139 Or. App. 119, 127 (1996)(a loan is not a "good" or a "service" for UTPA purposes). Accordingly, the Court concludes WMC is entitled to summary judgment as to Plaintiff's Fifth Claim.

V. Plaintiff's Misrepresentation Claim Against WMC (Third Claim)

In her First Amended Complaint, Plaintiff identifies the following alleged misrepresentations:

1. Closing documents for the WMC loan were dated August 21, 1998, even though the date of closing was August 26, 1998, and the escrow agent told Plaintiff the loan could not close unless Plaintiff signed the documents as dated.

2. Plaintiff was not informed of WMC's complete written closing instructions or of a fax from WMC to Chicago Title concerning the date of documents.[4] The fax letter reads:

TO ALL LOAN CLOSERS!!!!

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[4]Plaintiff's signature, however, appears on WMC's written closing instructions, which are attached to her First Amended Complaint as Exhibit R.

DO NOT UNDER ANY CIRCUMSTANCE CHANGE THE DATE OF ANY OF OUR LOAN DOCUMENTS.
IT IS COMPLETELY ACCEPTABLE FOR A BORROWER TO SIGN THEIR DOCUMENTS ON OR ANYTIME AFTER THE DATE OF THE ACTUAL DOCUMENT.
IF YOU CHANGE ANY DOCUMENT DATES, YOU MAY BE HELD RESPONSIBLE FOR ANY FEES REQUIRED TO CORRECT ANY RESULTING PROBLEMS WHICH COULD HOLD UP THE FUTURE SALE OF THIS LOAN. PLEASE **DO NOT CHANGE OUR DOCUMENT DATES!**

Plaintiff asserts she would not have entered into the loan transaction if she had known of these instructions, but she does not explain why this information was material to her decision to go forward with the loan.

3. WMC or its agents told Plaintiff that "consideration was to be paid prior to Defendant's receiving the original purported Deed of Trust, dated August 26, 1998, before delivery of said purported Deed of Trust to WMC." Plaintiff contends WMC took possession of the Deed of Trust before it paid consideration.

4. Plaintiff alleges WMC represented the Deed of Trust would include a lender, a borrower, and a trustee. Plaintiff contends a trustee was not appointed "nor was the Trustee informed of any appointment as Trustee, nor was the Trustee ever paid any consideration to act as Trustee."

5. Plaintiff alleges "at all times material during the commercial transaction with the Defendant, the mortgage was presented as a fixed rate." Plaintiff alleges she did not discover the loan actually carried an adjustable rate until December 18,

2000.

Without addressing any of these allegations specifically, WMC contends Plaintiff's misrepresentation claim is barred by Oregon's two-year statute of limitations.

> Or. Rev. Stat. § 12.110(1) provides:
> An action for . . . any injury to the person or rights of another, not arising on contract, and not especially enumerated in this chapter, shall be commenced within two years; provided, in an action at law based upon fraud or deceit, the limitation shall be deemed to commence only from the discovery of the fraud or deceit.

Under Oregon law, the term "discovery" is interpreted objectively and the period of limitations, therefore, began to run when Plaintiff knew or should have known of the alleged misrepresentation. *See Mathies v. Hoeck*, 284 Or. 539, 542, 588 P.2d 1 (1978). WMC argues Plaintiff should have known of any alleged misrepresentation at the time of closing because she was given copies of her loan documents for her records. She, however, admits she failed to read them. WMC apparently contends if Plaintiff had read the closing documents, she would have discovered all of the alleged misrepresentations.

It is uncontroverted that the adjustable interest rate was disclosed in the documents Plaintiff received at closing. Although Plaintiff alleges she was not given time to read the documents at the time of closing, she also admits she did not attempt to read any of the documents even after she took them home. If she had done so, she would have discovered the loan carried an adjustable interest rate. The Court, therefore, holds Plaintiff's claim that WMC misrepresented the interest rate on her loan is time barred.

As to the other alleged misrepresentations, Plaintiff admits she never spoke with anyone at WMC before or during the closing of her loan transaction, and all representations about

the loan were made by Dave Lavalley of Financial Link. Although Plaintiff dismissed her claims against Lavalley and Financial Link, she contends WMC is responsible for Lavalley's representations because Lavalley was acting as WMC's agent. Plaintiff, however, does not offer any evidence to support her contention. Plaintiff admits Lavalley was employed by Financial Link, and she hired him to help her obtain financing. Plaintiff's conclusory allegation concerning Lavalley's status, however, is not sufficient to create a fact question. In the absence of evidence of any misrepresentation to Plaintiff by WMC or someone acting on its behalf, WMC cannot be liable for misrepresentation.

VI. Plaintiff's Unilateral Mistake Claim Against WMC (Fourth Claim)

Plaintiff alleges she was mistaken in her understanding of the terms of the loan agreement because she did not know the loan had an adjustable interest rate. Plaintiff alleges WMC "intentionally misled plaintiff and concealed the actual terms of the loan agreement from her." Plaintiff, therefore, contends the loan agreement is unenforceable, and she is entitled to rescission.

"In order to avoid a contract on account of a unilateral mistake it is necessary that there be a mistake, that the mistake is basic and known to the other party, or that the circumstances are such that the other party, as a reasonable person, should have known of the mistake." *Gardner v. Meiling*, 280 Or. 665, 675, 572 P.2d 1012 (1977). Rescission is not permitted if the mistaken party was "guilty of gross negligence in making the mistake." *Id.* at 675. Plaintiff, as the mistaken party, has the burden of proving she was not grossly negligent. *Mariah Investments, Ltd. v. McCabe*, 163 Or. App. 91, 109, 986 P.2d 1209 (1999)(Landau, J., dissenting).

WMC argues Plaintiff was grossly negligent when she failed to discover the adjustable interest rate because the rate was disclosed on at least six documents signed by Plaintiff at

closing. Plaintiff does not dispute the fact that the adjustable rate was disclosed in the documents she received at closing nor does she offer any explanation for her failure to read the documents after she left the escrow office. In addition, Plaintiff does not offer any evidence to satisfy her burden to prove her mistake was not due to her own gross negligence.

To assess whether the mistaken party was grossly negligent, the court looks "to the extent to which the correct information was readily available." *Id.* at 110. The information concerning the adjustable interest rate was in Plaintiff's possession when she walked out of the escrow office and, therefore, could not have been more readily available to Plaintiff. Accordingly, the Court concludes Plaintiff's failure to review the loan documents that clearly disclosed the facts about which Plaintiff alleges she was mistaken constitutes gross negligence, and Plaintiff is not entitled to rescission on the basis of unilateral mistake.

VII. Plaintiff's Claim for Fraudulent Alteration Against WMC(Sixth Claim)

Plaintiff repeats her allegations that WMC represented to her that the loan had a fixed interest rate, and she asserts she would not have agreed to a loan with an adjustable rate.[5] The gist of Plaintiff's Sixth Claim, however, actually appears to be her assertion that sometime between August 27, 1998, and September 4, 1998, a document titled "Adjustable Rate Rider" was added to the Deed of Trust after the loan closed. Although the Rider appears to bear Plaintiff's signature, Plaintiff denies she signed it and asserts she did not see the Rider among the closing documents.

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[5]It is unclear how these allegations are relevant to a claim for fraudulent alteration of documents. In any event, as noted, Plaintiff admits no one from WMC made any representation to her regarding the interest rate on her loan.

Defendants contend the Adjustable Rate Rider was presented to Plaintiff, signed by her during closing, and was a part of the Deed of Trust at all times. The escrow agent testified the Rider was among the loan documents signed by Plaintiff at closing. After closing, the escrow agent sent the original Deed of Trust, including the Adjustable Rate Rider, directly to Multnomah County for recording. Defendants further argue Plaintiff's allegation that she "did not see" the Rider does not create a fact question as to whether the Rider was part of the Deed of Trust because Plaintiff admits she did not read the documents that she signed at closing. Accordingly, Defendants contend Plaintiff has not presented any evidence to support her claim of "fraudulent alteration" of the Deed of Trust.

Plaintiff admits the Adjustable Rate Rider was recorded in Multnomah County together with the Deed of Trust on September 4, 1998. Although the Rider is signed "Dianna Roberts ud," Plaintiff denies this is her signature. Plaintiff admits she signed other documents during closing and placed the letters "ud" after her signature to indicate she was signing under duress because she was not given adequate time to review the documents before signing. Plaintiff alleges the Rider may have been altered by an individual with the initials "ELF" because those letters appear on some of the loan documents. Plaintiff also alleges she does not know who "ELF" is or what these letters represent. Defendant, however, has presented evidence that the letters ELF are a trademark representing Electronic Laser Forms, the company that printed the forms. Plaintiff has not presented any evidence to controvert Defendants' explanation of the ELF letters nor identified any other evidence to support her claim that the Deed of Trust was fraudulently altered by adding the Adjustable Rate Rider after

closing.[6]

In summary, the Court concludes the only evidence in the record establishes the Adjustable Rate Rider was part of the Deed of Trust at closing and at the time the loan documents were recorded. Plaintiff's assertion that she "did not see" the Rider, combined with her testimony that she did not read any of the documents presented to her at closing, does not create a fact question on this issue. In addition, the Court concludes Plaintiff has not presented any evidence from which a trier of fact could find the Deed of Trust was fraudulently altered after closing. Accordingly, the Court holds WMC is entitled to summary judgment as to this claim.

VIII. Defendants' Counterclaim for Judicial Foreclosure

Defendant Bank One asserts it is entitled to a judgment of foreclosure because it has established it is the holder of the note and the beneficiary of the Deed of Trust by assignment from WMC and Plaintiff is in default of her obligation under the Deed of Trust.

Or. Rev. Stat. § 86.710 provides a trust deed "may be foreclosed by the beneficiary as provided by law for the foreclosure of mortgages on real property." Plaintiff admits she failed to make the payments required under the Note, but she argues Bank One is not entitled to foreclosure because Bank One has not established it has any interest in the Deed of Trust.[7] Plaintiff, however, ignores evidence in the record that

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[6]Plaintiff raises several objections to Defendants' affidavits. The Court, however, finds Defendants' affidavits to be admissible and Plaintiff's objections to be without merit.

[7]Plaintiff actually argues Bank One has not established it is a "successor trustee." Bank One, however, is a beneficiary under the Deed of Trust rather than a trustee. The original trustee was Regional Trustee Services, LLC, and Northwest Regional Trustee Services, LLC, was later appointed as successor trustee.

establishes Bank One and FNBC are one and the same. The record is uncontroverted that WMC assigned its interest in the Deed of Trust to FNBC, and that FNBC currently does business as Bank One. The Court concludes Bank One, therefore, is the current beneficiary under the Deed of Trust.

Bank One, however, does not adequately set forth all of the elements necessary to establish entitlement to judicial foreclosure. Bank One's Motion contains little more than a statement that it is the holder of a Note that Plaintiff has failed to pay. Bank One does not state whether any subordinate lien claimants exist, whether any other actions to collect the debt are pending, or the status of Plaintiff's bankruptcy filing. The Court, therefore, concludes Bank One has failed to establish on this record that it is entitled to judicial foreclosure as a matter of law.

CONCLUSION

For these reasons, the Court **GRANTS in part** and **DENIES in part** Defendants' Motion for Summary Judgment (#217) and **DENIES** Plaintiff's [Cross] Motion for Summary Judgment (#229).

IT IS SO ORDERED.

DATED this 4th day of February, 2004.

/s/ Anna J. Brown

ANNA J. BROWN
United States District Judge

RobertsCV02-499-02-02-04.wpd

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

DIANNA ROBERTS,

Plaintiff-Appellant,

v.

WMC MORTGAGE CORP.; et al.,

Defendants-Appellees.

No. 04-35523

D.C. No. CV-02-00499-BR

MEMORANDUM*

Before: GRABER and RAWLINSON, Circuit Judges, and OTERO*, District Judge.

The panel has voted to deny the Request for Publication. Plaintiff's Request for Publication filed on March 24, 2006, is DENIED.

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* The Honorable S. James Otero, U.S. District Judge for the Central District of California, sitting by designation.

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

DIANNA ROBERTS,

Plaintiff-Appellant,

v.

WMC MORTGAGE CORP.; et al.,

Defendants-Appellees.

No. 04-35523

D.C. No. CV-02-00499-BR

MEMORANDUM*

Before: GRABER and RAWLINSON, Circuit Judges, and OTERO*, District Judge.

The panel has voted to deny Appellant Roberts' Joint Petition for Panel Rehearing and Petition for Rehearing En Banc.

The full court has been advised of the petition for rehearing en banc, and no judge of the court has requested a vote.

The joint petition for panel rehearing and petition for rehearing en banc filed on March 23, 2006, is DENIED.

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* The Honorable S. James Otero, U.S. District Judge for the Central District of California, sitting by designation.

15 U.S.C. § 1604. Disclosure guidelines

(a) Promulgation, contents, etc., of regulations

The Board shall prescribe regulations to carry out the purposes of this subchapter. Except in the case of a mortgage referred to in section 1602 (aa) of this title, these regulations may contain such classifications, differentiations, or other provisions, and may provide for such adjustments and exceptions for any class of transactions, as in the judgment of the Board are necessary or proper to effectuate the purposes of this subchapter, to prevent circumvention or evasion thereof, or to facilitate compliance therewith.

(b) Model disclosure forms and clauses; publication, criteria, compliance, etc.

The Board shall publish model disclosure forms and clauses for common transactions to facilitate compliance with the disclosure requirements of this subchapter and to aid the borrower or lessee in understanding the transaction by utilizing readily understandable language to simplify the technical nature of the disclosures. In devising such forms, the Board shall consider the use by creditors or lessors of data processing or similar automated equipment. Nothing in this subchapter may be construed to require a creditor or lessor to use any such model form or clause prescribed by the Board under this section. A creditor or lessor shall be deemed to be in compliance with the disclosure provisions of this subchapter with respect to other than numerical disclosures if the creditor or lessor

(1) uses any appropriate model form or clause as published by the Board, or

(2) uses any such model form or clause and changes it by

> (A) deleting any information which is not required by this subchapter, or
>
> (B) rearranging the format, if in making such deletion or

rearranging the format, the creditor or lessor does not affect the substance, clarity, or meaningful sequence of the disclosure.

(c) Procedures applicable for adoption of model forms and clauses

Model disclosure forms and clauses shall be adopted by the Board after notice duly given in the Federal Register and an opportunity for public comment in accordance with section 553 of title 5.

(d) Effective dates of regulations containing new disclosure requirements

Any regulation of the Board, or any amendment or interpretation thereof, requiring any disclosure which differs from the disclosures previously required by this part, part D, or part E of this subchapter or by any regulation of the Board promulgated thereunder shall have an effective date of that October 1 which follows by at least six months the date of promulgation, except that the Board may at its discretion take interim action by regulation, amendment, or interpretation to lengthen the period of time permitted for creditors or lessors to adjust their forms to accommodate new requirements or shorten the length of time for creditors or lessors to make such adjustments when it makes a specific finding that such action is necessary to comply with the findings of a court or to prevent unfair or deceptive disclosure practices. Notwithstanding the previous sentence, any creditor or lessor may comply with any such newly promulgated disclosure requirements prior to the effective date of the requirements.

(f) *1 Exemption authority

(1) In general

The Board may exempt, by regulation, from all or part of this subchapter any class of transactions, other than transactions involving any mortgage described in section 1602 (aa) of this title, for which, in the determination of the Board, coverage under all

or part of this subchapter does not provide a meaningful benefit to consumers in the form of useful information or protection.

(2) Factors for consideration

n determining which classes of transactions to exempt in whole or in part under paragraph (1), the Board shall consider the following factors and publish its rationale at the time a proposed exemption is published for comment:

(A) The amount of the loan and whether the disclosures, right of rescission, and other provisions provide a benefit to the consumers who are parties to such transactions, as determined by the Board.

(B) The extent to which the requirements of this subchapter complicate, hinder, or make more expensive the credit process for the class of transactions.

(C) The status of the borrower, including——

(i) any related financial arrangements of the borrower, as determined by the Board;

(ii) the financial sophistication of the borrower relative to the type of transaction; and

(iii) the importance to the borrower of the credit, related supporting property, and coverage under this subchapter, as determined by the Board;

(D) whether the loan is secured by the principal residence of the consumer; and

(E) whether the goal of consumer protection would be undermined by such an exemption.

(g) Waiver for certain borrowers

(1) In general

The Board, by regulation, may exempt from the requirements of this subchapter certain credit transactions if——

(A) the transaction involves a consumer——

(i) with an annual earned income of more than $200,000; or

(ii) having net assets in excess of $1,000,000 at the time of the transaction; and

(B) a waiver that is handwritten, signed, and dated by the consumer is first obtained from the consumer.

(2) Adjustments by the Board

The Board, at its discretion, may adjust the annual earned income and net asset requirements of paragraph (1) for inflation.

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[1] So in original. No subsec. (e) has been enacted.

15 U.S.C. § 1635. Right of rescission as to certain transactions

(a) Disclosure of obligor's right to rescind

Except as otherwise provided in this section, in the case of any consumer credit transaction (including opening or increasing the credit limit for an open end credit plan) in which a security interest, including any such interest arising by operation of law, is or will be retained or acquired in any property which is used as the principal dwelling of the person to whom credit is extended, the obligor shall have the right to rescind the transaction until midnight of the third business day following the consummation of the transaction or the delivery of the information and rescission forms required under this section together with a statement containing the material disclosures required under this subchapter, whichever is later, by notifying the creditor, in accordance with regulations of the Board, of his intention to do so. The creditor shall clearly and conspicuously disclose, in accordance with regulations of the Board, to any obligor in a transaction subject to this section the rights of the obligor under this section. The creditor shall also provide, in accordance with regulations of the Board, appropriate forms for the obligor to exercise his right to rescind any transaction subject to this section.

(b) Return of money or property following rescission

When an obligor exercises his right to rescind under subsection (a) of this section, he is not liable for any finance or other charge, and any security interest given by the obligor, including any such interest arising by operation of law, becomes void upon such a rescission. Within 20 days after receipt of a notice of rescission, the creditor shall return to the boligor any money or property given as earnest money, downpayment, or otherwise, and shall take any action necessary or appropriate to reflect the termination of any security interest created under the transaction. If the creditor has delivered any property to the obligor, the obligor may retain possession of it. Upon the performance of the creditor''s

obligations under this section, the obligor shall tender the property to the creditor, except that if return of the property in kind would be impracticable or inequitable, the obligor shall tender its reasonable value. Tender shall be made at the location of the property or at the residence of the obligor, at the option of the obligor. If the creditor does not take possession of the property within 20 days after tender by the obligor, ownership of the property vests in the obligor without obligation on his part to pay for it. The procedures prescribed by this subsection shall apply except when otherwise ordered by a court.

(c) Rebuttable presumption of delivery of required disclosures

Notwithstanding any rule of evidence, written acknowledgment of receipt of any disclosures required under this subchapter by a person to whom information, forms, and a statement is required to be given pursuant to this section does no more than create a rebuttable presumption of delivery thereof.

(d) Modification and waiver of rights

The Board may, if it finds that such action is necessary in order to permit homeowners to meet bona fide personal financial emergencies, prescribe regulations authorizing the modification or waiver of any rights created under this section to the extent and under the circumstances set forth in those regulations.

(e) Exempted transactions; reapplication of provisions

This section does not apply to——

(1) a residential mortgage transaction as defined in section 1602 (w) of this title;

(2) a transaction which constitutes a refinancing or consolidation (with no new advances) of the principal balance then due and any accrued and unpaid finance charges of an existing extension of credit by the same creditor secured by an interest in the same property;

(3) a transaction in which an agency of a State is the creditor; or

(4) advances under a preexisting open end credit plan if a security interest has already been retained or acquired and such advances are in accordance with a previously established credit limit for such plan.

(f) Time limit for exercise of right

An obligor's right of rescission shall expire three years after the date of consummation of the transaction or upon the sale of the property, whichever occurs first, notwithstanding the fact that the information and forms required under this section or any other disclosures required under this part have not been delivered to the obligor, except that if

(1) any agency empowered to enforce the provisions of this subchapter institutes a proceeding to enforce the provisions of this section within three years after the date of consummation of the transaction,

(2) such agency finds a violation of this section, and

(3) the obligor's right to rescind is based in whole or in part on any matter involved in such proceeding, then the obligor's right of rescission shall expire three years after the date of consummation of the transaction or upon the earlier sale of the property, or upon the expiration of one year following the conclusion of the proceeding, or any judicial review or period for judicial review thereof, whichever is later.

(g) Additional relief

In any action in which it is determined that a creditor has violated this section, in addition to rescission the court may award relief under section 1640 of this title for violations of this subchapter not relating to the right to rescind.

(h) Limitation on rescission

An obligor shall have no rescission rights arising solely from the form of written notice used by the creditor to inform the obligor

of the rights of the obligor under this section, if the creditor provided the obligor the appropriate form of written notice published and adopted by the Board, or a comparable written notice of the rights of the obligor, that was properly completed by the creditor, and otherwise complied with all other requirements of this section regarding notice.

(i) Rescission rights in foreclosure

(1) In general

Notwithstanding section 1649 of this title, and subject to the time period provided in subsection (f) of this section, in addition to any other right of rescission available under this section for a transaction; after the initiation of any judicial or nonjudicial foreclosure process on the primary dwelling of an obligor securing an extension of credit, the obligor shall have a right to rescind the transaction equivalent to other rescission rights provided by this section, if——

(A) a mortgage broker fee is not included in the finance charge in accordance with the laws and regulations in effect at the time the consumer credit transaction was consummated; or

(B) the form of notice of rescission for the transaction is not the appropriate form of written notice published and adopted by the Board or a comparable written notice, and otherwise complied with all the requirements of this section regarding notice.

(2) Tolerance for disclosures

Notwithstanding section 1605 (f) of this title, and subject tothe time period provided in subsection (f) of this section, for the purposes of exercising any rescission rights after the initiation of any judicial or nonjudicial foreclosure process on the principal dwelling of the obligor securing an extension of credit, the disclosure of the finance charge and other disclosures affected by any finance charge shall be treated as being accurate for purposes of this section if the amount disclosed as the finance charge does

not vary from the actual finance charge by more than $35 or is greater than the amount required to be disclosed under this subchapter.

(3) Right of recoupment under State law

Nothing in this subsection affects a consumer''s right of rescission in recoupment under State law.

(4) Applicability

This subsection shall apply to all consumer credit transactions in existence or consummated on or after September 30, 1995.

15 U.S.C. § 1641. Liability of assignees

* * *

(c) Right of rescission by consumer unaffected

ny consumer who has the right to rescind a transaction under section 1635 of this title may rescind the transaction as against any assignee of the obligation.

* * *

(f) Treatment of servicer

(1) In general

A servicer of a consumer obligation arising from a consumer credit transaction shall not be treated as an assignee of such obligation for purposes of this section unless the servicer is or was the owner of the obligation.

(2) Servicer not treated as owner on basis of assignment for administrative convenience

A servicer of a consumer obligation arising from a consumer credit transaction shall not be treated as the owner of the obligation for purposes of this section on the basis of an assignment of the obligation from the creditor or another assignee to the servicer solely for the administrative convenience of the servicer in servicing the obligation. Upon written request by the obligor, the servicer shall provide the obligor, to the best knowledge of the servicer, with the name, address, and telephone number of the owner of the obligation or the master servicer of the obligation.

(3) "Servicer" defined

or purposes of this subsection, the term "servicer" has the same meaning as in section 2605 (i)(2) of title 12.

(4) Applicability

This subsection shall apply to all consumer credit transactions in existence or consummated on or after September 30, 1995.

12 U.S.C. § 1. Office of Comptroller of the Currency

There shall be in the Department of the Treasury a bureau charged with the execution of all laws passed by Congress relating to the issue and regulation of a national currency secured by United States bonds and, under the general supervision of the Board of Governors of the Federal Reserve System, of all Federal Reserve notes, except for the cancellation and destruction, and accounting with respect to such cancellation and destruction, of Federal Reserve notes unfit for circulation, the chief officer of which bureau shall be called the Comptroller of the Currency, and shall perform his duties under the general directions of the Secretary of the Treasury. The Comptroller of the Currency shall have the same authority over matters within the jurisdiction of the Comptroller as the Director of the Office of Thrift Supervision has over matters within the Director''s jurisdiction under section 1462a (b)(3) of this title. The Secretary of the Treasury may not delay or prevent the issuance of any rule or the promulgation of any regulation by the Comptroller of the Currency.

12 U.S.C. § 27. Certificate of authority to commence banking

(a) If, upon a careful examination of the facts so reported, and of any other facts which may come to the knowledge of the comptroller, whether by means of a special commission appointed by him for the purpose of inquiring into the condition of such association, or otherwise, it appears that such association is lawfully entitled to commence the business of banking, the comptroller shall give to such association a certificate, under his hand and official seal, that such association has complied with all the provisions required to be complied with before commencing the business of banking, and that such association is authorized to commence such business. But the comptroller may withhold from an association his certificate authorizing the commencement of business, whenever he has reason to suppose that the shareholders have formed the same for any other than the legitimate objects contemplated by title 62 of the Revised Statutes. A National Bank Association, to which the Comptroller of the Currency has heretofore issued or hereafter issues such certificate, is not illegally constituted solely because its operations are or have been required by the Comptroller of the Currency to limited to those of a trust company and activities related thereto.

(b)

(1) The Comptroller of the Currency may also issue a certificate of authority to commence the business of banking pursuant to this section to a national banking association which is owned exclusively (except to the extent directors'' qualifying shares are required by law) by other depository institutions or depository institution holding companies and is organized to engage exclusively in providing services to or for other depository institutions, their holding companies, and the officers, directors, and employees of such institutions and companies, and in providing correspondent banking services at the request of other depository institutions or their holding companies (also referred to as a "banker's bank").

(2) Any national banking association chartered pursuant to paragraph (1) shall be subject to such rules, regulations, and orders as the Comptroller deems appropriate, and, except as

otherwise specifically provided in such rules, regulations, or orders, shall be vested with or subject to the same rights, privileges, duties, restrictions, penalties, liabilities, conditions, and limitations that would apply under the national banking laws to a national bank.

Title 12: Banks and Banking

PART 226—TRUTH IN LENDING (REGULATION Z)
Subpart B—Open-End Credit

§ 226.15 Right of rescission.

(a) *Consumer's right to rescind.* (1)(i) Except as provided in paragraph (a)(1)(ii) of this section, in a credit plan in which a security interest is or will be retained or acquired in a consumer's principal dwelling, each consumer whose ownership interest is or will be subject to the security interest shall have the right to rescind: each credit extension made under the plan; the plan when the plan is opened; a security interest when added or increased to secure an existing plan; and the increase when a credit limit on the plan is increased.

(ii) As provided in section 125(e) of the Act, the consumer does not have the right to rescind each credit extension made under the plan if such extension is made in accordance with a previously established credit limit for the plan.

(2) To exercise the right to rescind, the consumer shall notify the creditor of the rescission by mail, telegram, or other means of written communication. Notice is considered given when mailed, or when filed for telegraphic transmission, or, if sent by other means, when delivered to the creditor's designated place of business.

(3) The consumer may exercise the right to rescind until midnight of the third business day following the occurrence described in paragraph (a)(1) of this section that gave rise to the right of rescission, delivery of the notice required by paragraph (b) of this section, or delivery of all material disclosures,[36] whichever occurs

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[36]The term *material disclosures* means the information that must be provided to satisfy the requirements in §226.6 with regard to the method of determining the finance charge and the

last. If the required notice and materia disclosures are not delivered, the right to rescind shall expire 3 years after the occurrence giving rise to the right of rescission, or upon transfer of all of the consumer's interest in the property, or upon sale of the property, whichever occurs first. In the case of certain administrative proceedings, the rescission period shall be extended in accordance with section 125(f) of the Act.

(4) When more than one consumer has the right to rescind, the exercise of the right by one consumer shall be effective as to all consumers.

(b) *Notice of right to rescind.* In any transaction or occurrence subject to rescission, a creditor shall deliver two copies of the notice of the right to rescind to each consumer entitled to rescind (one copy to each if the notice is delivered by electronic communication as provided in §226.36(b)). The notice shall identify the transaction or occurrence and clearly and conspicuously disclose the following:

(1) The retention or acquisition of a security interest in the consumer's principal dwelling.

(2) The consumer's right to rescind, as described in paragraph (a)(1) of this section.

(3) How to exercise the right to rescind, with a form for that purpose, designating the address of the creditor's place of business.

(4) The effects of rescission, as described in paragraph (d) of this section.

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balance upon which a finance charge will be imposed, the annual percentage rate, the amount or method of determining the amount of any membership or participation fee that may be imposed as part of the plan, and the payment information described in §226.5b(d)(5)(i) and (ii) that is required under §226.6(e)(2).

(5) The date the rescission period expires.

(c) *Delay of creditor's performance.* Unless a consumer waives the right to rescind under paragraph (e) of this section, no money shall be disbursed other than in escrow, no services shall be performed, and no materials delivered until after the rescission period has expired and the creditor is reasonably satisfied that the consumer has not rescinded. A creditor does not violate this section if a third party with no knowledge of the event activating the rescission right does not delay in providing materials or services, as long as the debt incurred for those materials or services is not secured by the property subject to rescission.

(d) *Effects of rescission.* (1) When a consumer rescinds a transaction, the security interest giving rise to the right of rescission becomes void, and the consumer shall not be liable for any amount, including any finance charge.

(2) Within 20 calendar days after receipt of a notiee of rescission, the creditor shall return any money or property that has been given to anyone in connection with the transaction and shall take any action necessary to reflect the termination of the security interest.

(3) If the creditor has delivered any money or property, the consumer may retain possession until the creditor has met its obligation under paragraph (d)(2) of this section. When the creditor has complied with that paragraph, the consumer shall tender the money or property to the creditor or, where the latter would be impracticable or inequitable, tender its reasonable value. At the consumer's option, tender of property may be made at the location of the property or at the consumer's residence. Tender of money must be made at the creditor's designated place of business. If the creditor does not take possession of the money or property within 20 calendar days after the consumer's tender, the consumer may keep it without further obligation.

(4) The procedures outlined in paragraphs (d)(2) and (3) of this section may be modified by court order.

(e) *Consumer's waiver of right to rescind.* (1) The consumer may modify or waive the right to rescind if the consumer determines that the extension of credit is needed to meet a bona fide personal financial emergency. To modify or waive the right, the consumer shall give the creditor a dated written statement that describes the emergency, specifically modifies or waives the right to rescind, and bears the signature of all the consumers entitled to rescind. Printed forms for this purpose are prohibited, except as provided in paragraph (e)(2) of this section.

(2) The need of the consumer to obtain funds immediately shall be regarded as a bona fide personal financial emergency provided that the dwelling securing the extension of credit is located in an area declared during June through September 1993, pursuant to 42 U.S.C. 5170, to be a major disaster area because of severe storms and flooding in the Midwest.[36a] In this instance, creditors may use printed forms for the consumer to waive the right to rescind. This exemption to paragraph (e)(1) of this section shall expire one year from the date an area was declared a major disaster.

(3) The consumer's need to obtain funds immediately shall be regarded as a bona fide personal financial emergency provided that the dwelling securing the extension of credit is located in an area declared during June through September 1994 to be a major disaster area, pursuant to 42 U.S.C. 5170, because of severe storms and flooding in the South.[36b] In this instance, creditors may use printed forms for the consumer to waive the right to rescind. This exemption to paragraph (e)(1) of this section shall

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[36a] A list of the affected areas will be maintained by the Board.

[36b] A list of the affected areas will be maintained and published by the Board. Such areas now include parts of Alabama, Florida, and Georgia.

expire one year from the date an area was declared a major disaster.

(4) The consumer's need to obtain funds immediately shall be regarded as a bona fide personal financial emergency provided that the dwelling securing the extension of credit is located in an area declared during October 1994 to be a major disaster area, pursuant to 42 U.S.C. 5170, because of severe storms and flooding in Texas. [36c] In this instance, creditors may use printed forms for the consumer to waive the right to rescind. This exemption to paragraph (e)(1) of this section shall expire one year from the date an area was declared a major disaster.

(f) *Exempt transactions.* The right to rescind does not apply to the following:

(1) A residential mortgage transaction.

(2) A credit plan in which a state agency is a creditor.

[Reg. Z, 46 FR 20892, Apr. 7, 1981, as amended at 54 FR 24688, June 9, 1989; 58 FR 40583, July 29, 1993; 59 FR 40204, Aug. 5, 1994; 59 FR 63715, Dec. 9, 1994; 66 FR 17338, Mar. 30, 2001]

[36c] A list of the affected areas will be maintained and published by the Board. Such areas now include the following counties in Texas: Angelina, Austin, Bastrop, Brazos, Brazoria, Burleson, Chambers, Fayette, Fort Bend, Galveston, Grimes, Hardin, Harris, Houston, Jackson, Jasper, Jefferson, Lee, Liberty, Madison, Matagorda, Montgomery, Nacagdoches, Orange, Polk, San Augustine, San Jacinto, Shelby, Trinity, Victoria, Washington, Waller, Walker, and Wharton.

Title 12: Banks and Banking

PART 226—TRUTH IN LENDING (REGULATION Z)
Subpart B—Closed-End Credit

§ 226.20 Subsequent disclosure requirements.

(a) *Refinancings.* A refinancing occurs when an existing obligation that was subject to this subpart is satisfied and replaced by a new obligation undertaken by the same consumer. A refinancing is a new transaction requiring new disclosures to the consumer. The new finance charge shall include any unearned portion of the old finance charge that is not credited to the existing obligation. The following shall not be treated as a refinancing:

(1) A renewal of a single payment obligation with no change in the original terms.

(2) A reduction in the annual percentage rate with a corresponding change in the payment schedule.

(3) An agreement involving a court proceeding.

(4) A change in the payment schedule or a change in collateral requirements as a result of the consumer's default or delinquency, unless the rate is increased, or the new amount financed exceeds the unpaid balance plus earned finance charge and premiums for continuation of insurance of the types described in §226.4(d).

(5) The renewal of optional insurance purchased by the consumer and added to an existing transaction, if disclosures relating to the initial purchase were provided as required by this subpart.

(b) *Assumptions.* An assumption occurs when a creditor expressly agrees in writing with a subsequent consumer to accept that consumer as a primary obligor on an existing residential mortgage transaction. Before the assumption occurs, the creditor shall make new disclosures to the subsequent consumer, based on the remaining obligation. If the finance charge originally imposed on the existing obligation was an add-on or discount finance charge, the creditor need only disclose:

(1) The unpaid balance of the obligation assumed.

(2) The total charges imposed by the creditor in connection with the assumption.

(3) The information required to be disclosed under §226.18(k), (l), (m), and (n).

(4) The annual percentage rate originally imposed on the obligation.

(5) The payment schedule under §226.18(g) and the total of payments under §226.18(h) based on the remaining obligation.

(c) *Variable-rate adjustments.* [45c] An adjustment to the interest rate with or without a corresponding adjustment to the payment in a variable-rate transaction subject to §226.19(b) is an event requiring new disclosures to the consumer. At least once each year during which an interest rate adjustment is implemented without an accompanying payment change, and at least 25, but no more than 120, calendar days before a payment at a new level is due, the following disclosures, as applicable, must be delivered or placed in the mail:

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[45c] Information provided in accordance with variable-rate subsequent disclosure regulations of other federal agencies may be substituted for the disclosure required by paragraph (c) of this section.

(1) The current and prior interest rates.

(2) The index values upon which the current and prior interest rates are based.

(3) The extent to which the creditor has foregone any increase in the interest rate.

(4) The contractual effects of the adjustment, including the payment due after the adjustment is made, and a statement of the loan balance.

(5) The payment, if different from that referred to in paragraph (c)(4) of this section, that would be required to fully amortize the loan at the new interest rate over the remainder of the loan term.

[46 FR 20892, Apr. 7, 1981, as amended at 52 FR 48671, Dec. 24, 1987]

§ 226.15 Right of rescission.

(a) *Consumer's right to rescind.* (1)(i) Except as provided in paragraph (a)(1)(ii) of this section, in a credit plan in which a security interest is or will be retained or acquired in a consumer's principal dwelling, each consumer whose ownership interest is or will be subject to the security interest shall have the right to rescind: each credit extension made under the plan; the plan when the plan is opened; a security interest when added or increased to secure an existing plan; and the increase when a credit limit on the plan is increased.

(ii) As provided in section 125(e) of the Act, the consumer does not have the right to rescind each credit extension made under the plan if such extension is made in accordance with a previously established credit limit for the plan.

(2) To exercise the right to rescind, the consumer shall notify the creditor of the rescission by mail, telegram, or other means of written communication. Notice is considered given when mailed, or when filed for telegraphic transmission, or, if sent by other means, when delivered to the creditor's designated place of business.

(3) The consumer may exercise the right to rescind until midnight of the third business day following the occurrence described in paragraph (a)(1) of this section that gave rise to the right of rescission, delivery of the notice required by paragraph (b) of this

section, or delivery of all material disclosures,[36] whichever occurs last. If the required notice and material disclosures are not delivered, the right to rescind shall expire 3 years after the occurrence giving rise to the right of rescission, or upon transfer of all of the consumer's interest in the property, or upon sale of the property, whichever occurs first. In the case of certain administrative proceedings, the rescission period shall be extended in accordance with section 125(f) of the Act.

(4) When more than one consumer has the right to rescind, the exercise of the right by one consumer shall be effective as to all consumers.

(b) *Notice of right to rescind.* In any transaction or occurrence subject to rescission, a creditor shall deliver two copies of the notice of the right to rescind to each consumer entitled to rescind (one copy to each if the notice is delivered by electronic communication as provided in §226.36(b)). The notice shall identify the transaction or occurrence and clearly and conspicuously disclose the following:

(1) The retention or acquisition of a security interest in the consumer's principal dwelling.

(2) The consumer's right to rescind, as described in paragraph (a)(1) of this section.

(3) How to exercise the right to rescind, with a form for that purpose, designating the address of the creditor's place of business.

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[36]The term *material disclosures* means the information that must be provided to satisfy the requirements in §226.6 with regard to the method of determining the finance charge and the balance upon which a finance charge will be imposed, the annual percentage rate, the amount or method of determining the amount of any membership or participation fee that may be imposed as part of the plan, and the payment information described in §226.5b(d)(5)(i) and (ii) that is required under §226.6(e)(2).

(4) The effects of rescission, as described in paragraph (d) of this section.

(5) The date the rescission period expires.

(c) *Delay of creditor's performance.* Unless a consumer waives the right to rescind under paragraph (e) of this section, no money shall be disbursed other than in escrow, no services shall be performed, and no materials delivered until after the rescission period has expired and the creditor is reasonably satisfied that the consumer has not rescinded. A creditor does not violate this section if a third party with no knowledge of the event activating the rescission right does not delay in providing materials or services, as long as the debt incurred for those materials or services is not secured by the property subject to rescission.

(d) *Effects of rescission.* (1) When a consumer rescinds a transaction, the security interest giving rise to the right of rescission becomes void, and the consumer shall not be liable for any amount, including any finance charge.

(2) Within 20 calendar days after receipt of a notice of rescission, the creditor shall return any money or property that has been given to anyone in connection with the transaction and shall take any action necessary to reflect the termination of the security interest.

(3) If the creditor has delivered any money or property, the consumer may retain possession until the creditor has met its obligation under paragraph (d)(2) of this section. When the creditor has complied with that paragraph, the consumer shall tender the money or property to the creditor or, where the latter would be impracticable or inequitable, tender its reasonable value. At the consumer's option, tender of property may be made at the location of the property or at the consumer's residence. Tender of money must be made at the creditor's designated place of business. If the creditor does not take possession of the money or property within 20 calendar days after the consumer's tender, the consumer may keep it without further obligation.

(4) The procedures outlined in paragraphs (d)(2) and (3) of this section may be modified by court order.

(e) *Consumer's waiver of right to rescind.* (1) The consumer may modify or waive the right to rescind if the consumer determines that the extension of credit is needed to meet a bona fide personal financial emergency. To modify or waive the right, the consumer shall give the creditor a dated written statement that describes the emergency, specifically modifies or waives the right to rescind, and bears the signature of all the consumers entitled to rescind. Printed forms for this purpose are prohibited, except as provided in paragraph (e)(2) of this section.

(2) The need of the consumer to obtain funds immediately shall be regarded as a bona fide personal financial emergency provided that the dwelling securing the extension of credit is located in an area declared during June through September 1993, pursuant to 42 U.S.C. 5170, to be a major disaster area because of severe storms and flooding in the Midwest. [36a] In this instance, creditors may use printed forms for the consumer to waive the right to rescind. This exemption to paragraph (e)(1) of this section shall expire one year from the date an area was declared a major disaster.

(3) The consumer's need to obtain funds immediately shall be regarded as a bona fide personal financial emergency provided that the dwelling securing the extension of credit is located in an area declared during June through September 1994 to be a major disaster area, pursuant to 42 U.S.C. 5170, because of severe storms and flooding in the South. [36b] In this instance, creditors may use printed forms for the consumer to waive the right to rescind. This exemption to paragraph (e)(1) of this section shall

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[36a] A list of the affected areas will be maintained by the Board.

[36b] A list of the affected areas will be maintained and published by the Board. Such areas now include parts of Alabama, Florida, and Georgia.

expire one year from the date an area was declared a major disaster.

(4) The consumer's need to obtain funds immediately shall be regarded as a bona fide personal financial emergency provided that the dwelling securing the extension of credit is located in an area declared during October 1994 to be a major disaster area, pursuant to 42 U.S.C. 5170, because of severe storms and flooding in Texas. [36e] In this instance, creditors may use printed forms for the consumer to waive the right to rescind. This exemption to paragraph (e)(1) of this section shall expire one year from the date an area was declared a major disaster.

(f) *Exempt transactions.* The right to rescind does not apply to the following:

(1) A residential mortgage transaction.

(2) A credit plan in which a state agency is a creditor.

[Reg. Z, 46 FR 20892, Apr. 7, 1981, as amended at 54 FR 24688, June 9, 1989; 58 FR 40583, July 29, 1993; 59 FR 40204, Aug. 5, 1994; 59 FR 63715, Dec. 9, 1994; 66 FR 17338, Mar. 30, 2001]

[36e] A list of the affected areas will be maintained and published by the Board. Such areas now include the following counties in Texas: Angelina, Austin, Bastrop, Brazos, Brazoria, Burleson, Chambers, Fayette, Fort Bend, Galveston, Grimes, Hardin, Harris, Houston, Jackson, Jasper, Jefferson, Lee, Liberty, Madison, Matagorda, Montgomery, Nacagdoches, Orange, Polk, San Augustine, San Jacinto, Shelby, Trinity, Victoria, Washington, Waller, Walker, and Wharton.

Board of Governors of the Federal Reserve System

Amendments to the Official Staff Commentary on
Regulation Z
Truth in Lending
May 2004*

Compliance with the following amendments (items 1 through 8), effective April 1, 2004, is optional until October 1, 2004.

1. *Comment 2(b)-2 is added to read as follows:*

2. *Amount.* The numerical amount must be a dollar amount unless otherwise indicated. For example, in a closed-end transaction (subpart C), the amount financed and the amount of any payment must be expressed as a dollar amount. In some cases, an amount should be expressed as a percentage. For example, in disclosures provided before the first transaction under an open-end plan (subpart B), creditors are permitted to explain how the amount of any finance charge will be determined; where a cash-advance fee (which is a finance charge) is

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* A complete commentary pamphlet, as amended effective April 1, 2004, consists of—
• the regulation pamphlet dated May 2002 (see inside front cover) and
• this slip sheet.
Items 1 through 8 are new. The other items were included in the October 2003 slip sheet.

a percentage of each cash advance, the amount of the finance charge for that fee is expressed as a percentage.

2. *Comment 15(a)(2)-1 is amended by adding two sentences at the end to read as follows:*

* * * Where the creditor fails to provide the consumer with a designated address for sending the notification of rescission, delivery of the notification to the person or address to which the consumer has been directed to send payments constitutes delivery to the creditor or assignee. State law determines whether delivery of the notification to a third party other than the person to whom payments are made is delivery to the creditor or assignee, in the case where the creditor fails to designate an address for sending the notification of rescission.

3. *Comment 15(d)(4)-1 is amended by adding two sentences at the end to read as follows:*

* * * The sequence of procedures under section 226.15(d)(2) and (3), or a court's modification of those procedures under section 226.15(d)(4), does not affect a consumer's substantive right to rescind and to have the loan amount adjusted accordingly. Where the consumer's right to rescind is contested by the creditor, a court would normally determine whether the consumer has a right to rescind and determine the amounts owed before establishing the procedures for the parties to tender any money or property.

4. *Comment 18(c)(1)(iii)-1 is amended in the last sentence by changing "footnote 40" to "footnote 41".*

5. *Comment 23(a)(2)-1 is amended by adding two sentences at the end to read as follows:*

* * * Where the creditor fails to provide the consumer with a designated address for sending the notification of rescission, delivering notification to the person or address to which the consumer has been directed to send payments constitutes delivery to the creditor or assignee. State law determines whether delivery of the notification to a third party other than the person to whom

payments are made is delivery to the creditor or assignee, in the case where the creditor fails to designate an address for sending the notification of rescission.

* * * The sequence of procedures under section 226.23(d)(2) and (3), or a court's modification of those procedures under section 226.23(d)(4), does not affect a consumer's substantive right to rescind and to have the loan amount adjusted accordingly. Where the consumer's right to rescind is contested by the creditor, a court would normally determine whether the consumer has a right to rescind and determine the amounts owed before establishing the procedures for the parties to tender any money or property.

7. *The commentary on section 226.27 is amended to read as follows:*

SECTION 226.27—Language of Disclosures

1. *Subsequent disclosures.* If a creditor provides initial disclosures in a language other than English, subsequent disclosures need not be in that other language. For example, if the creditor gave Spanish-language initial disclosures, periodic statements and change-in-terms notices may be made in English.

References

Statute: None
Other sections: None
Previous regulation: § 226.6(a)
1981 changes: No substantive change

8. *Comment 32(a)(1)(ii)-1 is amended in paragraph ii to read as follows:*

ii. If the consumer pays the $300 fee for the creditor-conducted appraisal in cash at closing, the $300 is

included in the points and fees calculation because it is paid to the creditor. However, because the $300 is not financed by the creditor, the fee is not part of the amount financed under section 226.18(b). In this case, the amount financed is the same as the total loan amount: $9,600 ($10,000, less $400 in prepaid finance charges).

9. *Effective January 1, 2003, in comment 32(a)(1)(ii)-2, paragraph viii is added, and effective January 1, 2004, paragraph ix is added to read as follows:*

viii. For 2003, $488, reflecting a 1.64 percent increase in the CPI-U from June 2001 to June 2002, rounded to the nearest whole dollar.

ix. For 2004, $499, reflecting a 2.22 percent increase in the CPI-U from June 2002 to June 2003, rounded to the nearest whole dollar.

Compliance with the following amendments (items 10 through 14), effective April 1, 2003, is optional until October 1, 2003.

10. *Comment 6(b)-2, paragraphs ix and x, are added to read as follows:*

ix. A fee to expedite delivery of a credit card, either at account opening or during the life of the account, provided delivery of the card is also available by standard mail service (or other means at least as fast) without paying a fee for delivery

x. A fee charged for arranging a single payment on the credit account, upon the consumer's request (regardless of how frequently the consumer requests the service), if the credit plan provides that the consumer may make payments on the account by another reasonable means, such as by

standard mail service, without paying a fee to the creditor

11. *Comment 12(a)(2)-6 is amended to read as follows:*

6. *One-for-one rule—exception.* The regulation does not prohibit the card issuer from:

i. Replacing a debit/credit card with a credit card and another card with only debit functions (or debit functions plus an associated overdraft capability), since the latter card could be issued on an unsolicited basis under Regulation E

ii. Replacing an accepted card with more than one renewal or substitute card, provided that:

A. No replacement card accesses any account not accessed by the accepted card;

B. For terms and conditions required to be disclosed under section 226.6, all replacement cards are issued subject to the same terms and conditions, except that a creditor may vary terms for which no change in terms notice is required under section 226.9(c); and

C. Under the account's terms the consumer's total liability for unauthorized use with respect to the account does not increase.

12. *Comment 18(g)-5 is amended to read as follows:*

5. *Mortgage insurance.* The payment schedule should reflect the consumer's mortgage insurance payments until the date on which the creditor must automatically terminate coverage under applicable law, even though the consumer may have a right to request that the insurance be cancelled earlier. The payment schedule must reflect the legal obligation, as determined by applicable state or other law. For example, assume that under applicable law, mortgage insurance must terminate after the 130th

scheduled monthly payment, and the creditor collects at closing and places in escrow two months of premiums. If, under the legal obligation, the creditor will include mortgage insurance premiums in 130 payments and refund the escrowed payments when the insurance is terminated, the payment schedule should reflect 130 premium payments. If, under the legal obligation, the creditor will apply the amount escrowed to the two final insurance payments, the payment schedule should reflect 128 monthly premium payments. (For assumptions in calculating a payment schedule that includes mortgage insurance that must be automatically terminated, see comments 17(c)(1)-8 and 17(c)(1)-10.)

13. *Comment 19(b)(1)-2 is amended by removing "comment 19(b)-4" and adding "comment 19(b)-5" in its place.*

14. *Comment 32(a)(1)(i)-4 is amended to read as follows:*

4. *Treasury securities.* To determine the yield on comparable Treasury securities for the annual percentage rate test, creditors may use the yield on actively traded issues adjusted to constant maturities published in the Board's "Selected Interest Rates" (statistical release H-15). Creditors must use the yield corresponding to the constant maturity that is closest to the loan's maturity. If the loan's maturity is exactly halfway between security maturities, the annual percentage rate on the loan should be compared with the yield for Treasury securities having the lower yield. In determining the loan's maturity, creditors may rely on the rules in section 226.17(c)(4) regarding irregular first payment periods. For example:

i. If the H-15 contains a yield for Treasury securities with constant maturities of 7 years and 10 years and no maturity in between, the annual percentage rate for an 8-year mortgage loan is compared with the yield of securities having a 7-year maturity, and the annual percentage rate for a 9-year mortgage loan is compared

with the yield of securities having a 10-year maturity.

ii. If a mortgage loan has a term of 15 years, and the H-15 contains a yield of 5.21 percent for constant maturities of 10 years, and also contains a yield of 6.33 percent for constant maturities of 20 years, then the creditor compares the annual percentage rate for a 15-year mortgage loan with the yield for constant maturities of 10 years.

iii. If a mortgage loan has a term of 30 years, and the H-15 does not contain a yield for 30-year constant maturities, but contains a yield for 20-year constant maturities, and an average yield for securities with remaining terms to maturity of 25 years and over, then the annual percentage rate on the loan is compared with the yield for 20-year constant maturities.

In

Recorded in the County of Multnomah. Oregon
C. Swick. Deputy Clerk
Tital: 5.00
2000-132848 09-25-2000 10:41:25am ATSKB
A80 1 RRF
5.00

WMC No. 10212507
Inv. Loan No.
Commit. No. WMC1998-B
Tax Parcel I.D.

Prepared By: SHERI SMART
When Recorded. Mail To:
WMC MORTGAGE CORP.
Attn: TR-59
P.O.BOX 54089
LOS ANGELES, CA 90054-9984

Note: This assignment should be kept with the Note and Deed of Trust hereby assigned.

ASSIGNMENT OF DEED OF TRUST

For Valuable Consideration, WMC MORTGAGE CORP.
P.O. BOX 54089, LOS ANGELES, CA 90054
hereby grants, assigns, and transfers to: THE FIRST NATIONAL BANK OF CHICAGO, AS TRUSTEE UNDER THE POOLING AND SERVICING AGREEMENT, DATED SEPTEMBER 1, 1998, WMC SERIES 1998-B, WITHOUT RECOURSE.
all beneficial interest undert hat certain Deed of Trust dated AUGUST 21, 1998 executed by DIANA ROBERTS
as Trustor, to REGIONAL TRUSTEE SERVICES CORPORATION

as Trustee, and recorded as Instrument No. 98159385, on 9-4-98, in Book ___ at Page ___ of Official Records, in the office of the Recorder of MULTNOMAH County, OREGON, together with the Promissory Note secured by said Deed of Trust and also all rights accrued or to accrue under said Deed of Trust.
AS DESCRIBED IN DEED OF TRUST REFERRED TO HEREIN.
Being ReRecorded To Include Document Number And Recording Date
Property Address:
17930-32 NORTHEAST WASCO STREET
PORTLAND, OR 97230

WMC MORTGAGE CORP.
/S/ Lorraine Best
LORRAINE BEST, Assistant Secretary
Dated JUNE 16, 2000

State of California SS
County of Los Angeles SS

On JUNE 16, 2000, before me the undersigned, a Notary Public in and for said State, personally appeared LORRAINE BEST, Assistant Secretary, personally known to me (or proved to me on the basis of satisfactory evidence) to be the duly authorized person who executed the within instrument on behalf of the Corporation, and acknowledged to me that such Corporation executed the within instrument pursuant to Its By-laws or a Resolution of its Board of Directors.

WITNESS my hand and official seal:

/s/ Doris K. Shafer
Notary Public in and for said County and State

DORIS K. SCHAFER
Commission # 1245380
Notary Public - California
Los Angeles County
My Comm. Expires Dec 11, 2003

PROTEST FOR NON-ACCEPTANCE OF NOTICE OF DECEMBER 13, 2001, TRUSTEE'S NOTICE OF SALE AND DEED OF TRUST, RECORDED IN THE COUNTY OF MULTNOMAH, OREGON, RECORDING NUMBER 98159385 DUE TO RESCISSION OF CONTRACT.

On the 12th day of April, 2002, I, Dianna Joyce Roberts, appeared before me as a notary public for the State of Oregon and request this protest by making and proving competent evidence satisfactory to that notary public and in speaking to the notary public did dishonor the Deed of Trust along with other documents since the debt due was canceled as a result of a notice of rescission of contract filed in a timely fashion on or about August 3, 2001.

Dated: 4/12/02 /s/ Dianna Joyce Roberts
Dianna Joyce Roberts

STATE OF OREGON, County of Clackamas) ss

Acknowledged before me this 12th day of April, 2002.

(Seal) /s/ Donald R Markham
Notary Public - State of Oregon
Commission expires: 4/26/02

On the 12th day of April, in the year 2002, I, Donald R. Markham, notary public for the State of Oregon, domiciled in the County of Clackamas County, Oregon, at the request of Dianna Joyce Roberts, did exhibit and view the Notice of December 13, 2001, Trustee's Notice of Sale, Deed of Trust, recorded in the County of Multnomah, Oregon, recording number 98159385 and being the notary public of record for a

rescission of contract dated August 3, 2001 and which was duly noted for non-acceptance. Repudiation of this debt is pursuant to O.R.S. 73.0505, 73.0504, 73.050 and 194.070.

Upon competent evidence, Dianna Joyce Roberts, made available information satisfactory to Donald R. Markham, notary public for the State of Oregon to prove dishonor for the purposes of O.R.S. 73.0505 of the above debt. Attached to this protest are true copies of the instruments that are being returned pursuant to O.R.S. 73.053.

Wherefore, I, Donald R. Markham, the said notary, at the request aforesaid, have protested, and by these presents do protest against all parties of said Deed of Trust, and all other parties thereto or therein concerned, for all costs, damages and interest, presents and to come, for want of Deed of Trust due to rescission of contract.

In testimony, wherefore, I, have, on the last mentioned day and year, in the County of Clackamas, State of Oregon, signed this presentment.

/s/ Donald R Markham
Notary Public - State of Oregon
52127 SE Cherryville Drive
Sandy, Oregon 97055

ARTICLE III

ADMINISTRATION AND SERVICING OF MORTGAGE LOANS

Section 3.01. Master Servicer to Assure Servicing. (a) The Master Servicer shall take such actions as are necessary to ensure the servicing and administration of the Mortgage Loans and any REO Property in accordance with this Agreement and its normal servicing practices, which generally shall conform to the standards of an institution prudently servicing mortgage loans similar to the Mortgage Loans for its own account and shall have full authority to do anything it reasonably deems appropriate or desirable in connection with such servicing and administration. The Master Servicer may perform its responsibilities relating to servicing through other agents or independent contractors, but shall not thereby be released from any of its responsibilities as hereinafter set forth. The authority of the Master Servicer, in its capacity as Master Servicer, and any Subservicer acting on its behalf, shall include, without limitation, the power to (i) consult with and advise any Subservicer regarding administration of a related Mortgage Loan, (ii) approve any recommendation by a Subservicer to foreclose on a related Mortgage Loan, (iii) supervise the filing and collection of insurance claims and take or cause to be taken such actions on behalf of the insured Person thereunder as shall be reasonably necessary to prevent the denial of coverage thereunder, and (iv) effectuate foreclosure or other conversion of the ownership of the Mortgaged Property securing a related Mortgage Loan, including the employment of attorneys, the institution of legal proceedings, the collection of deficiency judgments, the acceptance of compromise proposals, the filing of claims under any insurance policy and any other matter pertaining to a Delinquent Mortgage Loan. The authority of the Master Servicer shall include, in addition, the power on behalf of the Certificateholders, the Trustee

or either of them to (i) execute and deliver customary consents or waivers and other instruments and documents, (ii) consent to transfer of any related Mortgaged Property and assumptions of the related Mortgage Loans (in the matter provided in this Agreement) and (iii) collect any Insurance Proceeds and Liquidation Proceeds. Without limiting the generality of the foregoing, the Master Servicer and any Subservicer acting on its behalf may, and is hereby authorized and empowered by the trustee to, execute and deliver, on behalf of itself, the Certificateholders, the Trustee or either of them, any instruments of satisfaction, cancellation, partial or full release, discharge and all other comparable instruments, with respect to the Mortgage Loan, any related insurance policies and the accounts related thereto, and the Mortgaged Properties. The Master Servicer may exercise this power in its own name or in the name of a Subservicer.

(b) Notwithstanding the provisions of Subsection 3.01(a), the Master Servicer shall not take any action adverse to the rights and interests of the Trustee or the Certificateholders under this Agreement.

(c) The Trustee shall furnish the Master Servicer with any powers of attorney and other documents in the form provided by it which are necessary or appropriate to enable the Master Servicer to service and administer the relatec Mortgage Loans and REO Property.

APPOINTMENT OF SUCCESSOR TRUSTEE

Servicer Loan No. 1102125075

KNOW ALL MEN BY THESE PRESENTS, that Dianna Roberts, as grantors, and Regional Trustee Services Corporation, as the trustee, and WMC Mortgage Corp., is the beneficiary under that certain trust deed dated 08/21/98, and recorded 09/04/98, as 98159385 of the Mortgage Records of Multnomah County, Oregon. The undersigned, who is the present beneficiary under said trust deed desires to appoint anew trustee in the place and stead of the original trustee named above;

NOW THEREFORE, in view of the premises, the undersigned hereby appoints Northwest Trustee Services, LLC, whose address is P.O. Box 4143, Bellevue, WA 98009-4143 as successor trustee under said trust deed, to have all the powers of said original trustee, effective immediately.

In construing this instrument, and whenever the context so requires, the singular includes the plural.

IN WITNESS WHEREOF, the undersigned beneficiary has executed this document. If the undersigned is a corporation, it has caused its name to be signed and its seal affixed by an officer or other person duly authorized to do so by its board of trustees.

Fairbanks Capital Corp.
Attorney In Fact For

By: [scribble]
Typed Name: ____
Title: _____

[stamp:]Kristen Varnedoe
Assistant Secretary
Document Control

State of Utah
County of Salt Lake

This instrument was acknowledged before me on 7-9-01 by Kristen Varnedoe as Assistant Secretary Fairbanks Capital Corp.

/s/ Mendi N. Aragon
Notary Signature
My commission expires: _____

[seal] **NOTARY PUBLIC**
MENDI N. ARAGON
136 So Main Ste 500
Salt Lake City, UT 84101
My Commission Expires
March 13th, 2002
STATE OF UTAH

APPOINTMENT OF SUCCESSOR TRUSTEE
RE: Trust Deed from
Roberts, Dianna
Grantor
to
Northwest Trustee Services, LLC
Trustee File No. 7006.20536

After recording return to:
Kathy Taggart
Northwest Trustee Services, LLC
PO Box 4143
BELLEVUE, WA 98009-4143

* * *

3. Defendant objects to the use of "you," "your," and "Bank One, N.A." in the Interrogatories to the extent it includes "any of its past or present parents, related companies, affiliates, divisions, business units, departments, insurers, agents, ... attorneys, investigators" on the grounds that such definition renders the Interrogatories overbroad, unduly burdensome, oppressive, and vague and ambiguous; seeks information outside Defendant's possession, custody or control; and calls for the production of information protected by the attorney-client privilege and the attorney work product doctrine.

4. Defendant objects to the definition of "WMC" in the Interrogatories to the extent it includes "subsidiaries, affiliates, parent corporations, successors," and "directors,... agents, servants, and persons acting on its behalf" on the grounds that such definition renders the Interrogatories overbroad, unduly burdensome, oppressive, and vague and ambiguous; seeks information outside Defendant's possession, custody or control; and calls for the production of information protected by the attorney-client privilege and the attorney work product doctrine.

* * *

PRESTON GATES & ELLIS LLP
222 SW COLUMBIA STREET
SUITE 1400
PORTLAND, OR 97201-6632
TELEPHONE (503) 228-3200

* * *

INTERROGATORY NO. 10: Was Fairbanks Capital Corporation ever appointed attorney in fact for Bank One, N.A., as it relates to plaintiff's debt which is the basis of this legal action.

RESPONSE: On information and belief, Bank One, N.A. never appointed Fairbanks Capital Corporation attorney in fact as it relates to plaintiff's debt.

* * *

K:\37321\00006\LJ\LJ__P23AD

PRESTON GATES & ELLIS LLP
222 SW COLUMBIA STREET
SUITE 1400
PORTLAND, OR 97201-6632
TELEPHONE (503) 228-3200

1s

WMC SECURED ASSETS CORP.,
Company,

WMC MORTGAGE CORP.,
Master Servicer,

and

THE FIRST NATIONAL BANK OF CHICAGO,
Trustee

POOLING AND SERVICING AGREEMENT
Dated as of September 1, 1998

Mortgage Pass-Through Certificates
Series 1998-B

[TPW: NY01:672561.5] 18305-00013 09/06/98 07:42PM

65.

Copies of the protest were sent to all parties and/or agents having and/or showing an interest in the Deed of Trust. Notices were sent to Northwest Trustee Services, LLC., WMC, Bank One, Regional Trustee Services Corporation, Nationwide Process Service. Inc., Routh, Crabtree, Fennell, and Loan Services Center, a.k.a Fairbanks Capital.

66.

To date no party or agent has responded to the notice of protest.

69.

A Notice of Rescission by the Plaintiff to Master Service and/or Subservicer would under the terms of the Pooling and Serving Agreement be delivered to the Trustee of said agreement.

(iii) The Company is not required to obtain the consent of any other Person or any consent, license, approval or authorization from, or registration or declaration with, any governmental authority, bureau or agency in connection with the execution, delivery, performance, validity or enforceability of this Agreement, except for such consent, license, approval or authorization, or registration or declaration, as shall have been obtained or filed, as the case may be;

(iv) The execution and delivery of this Agreement and the performance of the transactions contemplated hereby by the Company will not violate any provision of any existing law or regulation or any order or decree of any court applicable to the Company or any provision of the certificate of incorporation or bylaws of the Company, or constitute a material breach of any mortgage, indenture, contract or other agreement to which the Company is a party or by which the Company may be bound; and

(v) No litigation or administrative proceeding of or before any court, tribunal or governmental body is currently pending, or to the knowledge of the Company threatened, against the Company or any of its properties or with respect to this Agreement which, to the knowledge of the Company, has a reasonable likelihood of resulting in a material adverse effect on the transactions contemplated by this Agreement.

Section 2.04. Enforcement of Representations and Warranties. The Master Servicer, on behalf of and subject to the direction of the Trustee, shall enforce the representations and warranties and related obligations for breaches thereof of the Seller pursuant to the Mortgage Loan Purchase Agreement. Upon the discovery by the Seller, the Master Servicer, the Trustee or the Company of a breach of any of the representations and warranties made in the Mortgage Loan Purchase Agreement in respect of any

Mortgage Loan, which materially and adversely affects the interests of the Certificateholders in such Mortgage Loan, the party discovering such breach shall give prompt written notice to the other parties. The Master Servicer shall promptly notify the Seller of such breach and request that, pursuant to the terms of the Mortgage Loan Purchase Agreement, the Seller either cure such breach in all material respects or purchase such Mortgage Loan within 90 days from the date the Seller was notified of such breach, in each instance in accordance with the Mortgage Loan Purchase Agreement; provided that the Seller shall, subject to the conditions set forth in the Mortgage Loan Purchase Agreement, have the option to substitute a Qualified Substitute Mortgage Loan or Qualified Substitute Mortgage Loans for such Mortgage Loan if such substitution occurs within two years following the Closing Date; provided that if the omission or defect would cause the Mortgage Loan to be other than a "qualified mortgage" as defined in Section 860G(a)(3) of the Code, any such cure or repurchase must occur within 90 days from the date such breach was discovered. Monthly Payments due with respect to Qualified Substitute Mortgage Loans in the month of substitution shall not be part of the Trust Fund and shall be retained by the Master Servicer and remitted by the MS to the Seller on the next succeeding Distribution Date. For the month of substitution, remittance to the Distribution Account pursuant to this Agreement shall include the Monthly Payment received on a Deleted Mortgage Loan for such month, and thereafter the Seller shall be entitled to retain all amounts received in respect of such Deleted Mortgage Loan. The Master Servicer

7): On what date did WMC receive the "Valuable Consideration" from The First National Bank of Chicago, as Trustee under the Pooling and Servicing Agreement, dated September 1, 1998, WMC Series 1998-B, Without Recourse, as stated in the "Assignment of Deed of Trust," attached is a copy of said assignment and marked Exhibit C.

RESPONSE: WMC did not receive any consideration from FNBC. Any consideration would have been provided at the time the loan on the subject property was transferred to the asset pool and would have been provided by the company forming the pool, WMC Secured Assets Corp. This date is believed to be September 1, 1998 or shortly thereafter.

DATED: July 8, 2003.

By: /s/ Linda Johannsen
John E. Kennedy, OSB #98269
Linda Johannsen, OSB #90306
(503) 228-3200
Attorneys for Plaintiff WMC Mortgage Corporation and Bank One, N.A.

2): On what date did the trustee or successor trustee under the Pooling and Servicing Agreement provide the "Valuable Consideration" to WMC as stated in the Assignment of Deed of Trust, a true copy attached and marked Exhibit A?

RESPONSE: The trustee did not provide the "Valuable Consideration" to WMC. This date is believed to be September 1, 1998 or shortly thereafter.

DATED: July 8, 2003.

By: /s/ Linda Johannsen
John E. Kennedy, OSB #98269
Linda Johannsen, OSB #90306
(503) 228-3200
Attorneys for Plaintiff WMC Mortgage Corporation and Bank One, N.A.

Comptroller of the Currency

TREASURY DEPARTMENT OF THE UNITED STATES

Washington, D.C.

Whereas, satisfactory evidence has been presented to the Comptroller of the Currency that ***The First National Bank of Chicago*** located in ***Chicago***, State of ***Illinois***, has complied with all provisions of the statutes of the United States required to be complied with before being authorized to commence the business of banking as a National Banking Association;

Now, therefore, I hereby certify that the above-named association is authorized to commence the business of banking as a National Banking Association under the title ***Bank One, National Association*** effective ***the thirteenth day of September 1999***.

(Seal)

In testimony whereof, witness my signature and seal of office this *thirteenth* day of *September 1999*.

/s/ John D. Hawke, Jr.
Comptroller of the Currency

Charter No. 8, originally issued on the twenty-second day of June 1863.

15 U.S.C. § 1602. Definitions and rules of construction

* * *

(f) The term "creditor" refers only to a person who both (1) regularly extends, whether in connection with loans, sales of property or services, or otherwise, consumer credit which is payable by agreement in more than four installments or for which the payment of a finance charge is or may be required, and (2) is the person to whom the debt arising from the consumer credit transaction is initially payable on the face of the evidence of indebtedness or, if there is no such evidence of indebtedness, by agreement. Notwithstanding the preceding sentence, in the case of an open-end credit plan involving a credit card, the card issuer and any person who honors the credit card and offers a discount which is a finance charge are creditors. For the purpose of the requirements imposed under part D of this subchapter and sections 1637(a)(5), 1637(a)(6), 1637(a)(7), 1637(b)(1), 1637(b)(2), 1637(b)(3), 1637(b)(8), and 1637(b)(10) of this title, the term "creditor" shall also include card issuers whether or not the amount due is payable by agreement in more than four installments or the payment of a finance charge is or may be required, and the Board shall, by regulation, apply these requirements to such card issuers, to the extent appropriate, even though the requirements are by their terms applicable only to creditors offering open-end credit plans. Any person who originates 2 or more mortgages referred to in subsection (aa) of this section in any 12-month period or any person who originates 1 or more such mortgages through a mortgage broker shall be considered to be a creditor for purposes of this subchapter.